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SUPREME COURT, U.S.

In The

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioner*

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Legal Foundation (NLF) is 501c(3) is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the issue of child pornography.

SUMMARY OF THE ARGUMENT

Michael Williams posted announcements on public and private Internet chat rooms regarding the bartering of photographs of child pornography falls under the commercial speech doctrine. Relying upon the characteristics of commercial speech found in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983), Williams's postings are economically motivated, are an advertisement, and reference a specific product. First, Williams's postings have an economic motivation because he anticipates obtaining pornographic pictures in exchange for his pornographic pictures, and bartering of goods, like pictures, plays an important role in commerce. Second, Williams's postings are commercial advertisements because they are not speech that is solely informative or editorial in nature. Third, Williams's postings refer specifically to his daughter, including approximate age and scenario, as well as indicating the pornographic nature of the pictures; thus indicating a specific product for barter. Ultimately, because Williams's

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[1] The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *amicus curiae*, its members, and its counsel.

chat room postings about child pornography for barter fit the characteristics of commercial speech, they should be held to such standards.

ARGUMENT

I. THE ACT OF BARTERING PORNOGRAPHIC PICTURES ON THE INTERNET IS A COMMERCIAL ACTION AND SHOULD BE REGULATED AS COMMERCIAL SPEECH.

Commercial speech is usually not afforded the same protection under the First Amendment as non-commercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). Williams bartered pornographic pictures, which is a commercial act which should be regulated as commercial speech under the First Amendment. To determine whether speech is commercial, this Court relies on a common sense understanding and history of commercial speech as speech regarding a commercial transaction and the three characteristics described in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983).

A. Williams's Speech is Commercial Speech Because it Relates to a Commercial Transaction.

The understanding of what commercial speech entails has changed over time. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citation omitted), this Court stated that commercial speech is that speech "which does 'no more than propose a commercial transaction.'" The United States District Court for the Third Circuit clarified this definition in *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 933 (3d Cir. 1990) (citing *Bolger*, 463 U.S. at 66-67; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980)), defining commercial

speech as "expression related to the economic interests of the speaker and its audience." This Court in *Zauderer v. Office of Disciplinary Counsel* made the point that "our commercial speech doctrine rests heavily on 'the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" 471 U.S. at 637 (quoting *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 455-56 (1978)).

A proper understanding of commerce is a prerequisite to properly defining commercial speech. In *Kidd v. Pearson*, 128 U.S. 1, 20-21 (1888), this Court, in differentiating manufacture from commerce, quoted the definition of commerce found in *County of Mobile v. Kimball*, 102 U.S. 691, 702 (1881) (emphasis added), which states "'[c]ommerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and *exchange of commodities*.'" Ten years later in *Adair v. United States*, 208 U.S. 161, 177 (1908), this Court included "traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages . . . indeed, every species of commercial intercourse among the several States" in its understanding of commerce. The inclusion of communication and the transmission of messages is relevant because it broadens commerce from the mere trading or selling and purchasing of goods. The Internet, as a borderless creation, connects people of the several states which affects national commerce. *See, Am. Library Ass'n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997).

In 1983, this Court, in order to clearly determine what speech qualifies as commercial speech, set out three characteristics of commercial speech in *Bolger*, 463 U.S. at 66-67. There, this Court, recognized three characteristics of commercial speech: advertisements, references to specific products, and an economic motivation behind the speech. *Id.*

This Court relies on an aggregate of the characteristics. None of these characteristics by itself is enough to classify the speech as commercial speech, but any combination of the characteristics is indicative of commercial speech. *Id. at* 67. When all three of the characteristics are met, such as in this case, there is an overwhelming indication of commercial speech. *Id.*

B. Williams's Act of Bartering Pornographic Pictures on the Internet Meets the Three *Bolger* Characteristics Because it is Economically Motivated, is an Advertisement, and Refers to a Specific Product.

As stated above, *Bolger v. Youngs Drug Products Corp.* sets out three characteristics of commercial speech. 463 U.S. at 66-67. If the speech is an advertisement, refers to specific products and has an economic motivation it is commercial speech. *Id.* Williams's online conversations regarding, leading to, and including the bartering of pornographic pictures on the Internet has an economic motivation of receiving more pornographic pictures through a barter transaction, is an advertisement of pornographic pictures, and refers to specific pornographic pictures of his daughter for trade.

1. *Williams's Bartering of Pornographic Pictures is Economically Motivated Because He Anticipates Receiving Something of Value in Return.*

Williams had an economic motivation behind bartering pornographic pictures of children on the Internet because he receives something of value in return. In *Bolger v. Youngs Drug Products Corp.* this Court included the characteristic of an economic motivation in determining commercial speech. 463 U.S. at 67.

Bartering is a form of commerce because commerce is generally a trade between two parties. *Commerce, Black's Law Dictionary* 269 (6th ed. 1990). Bartering, simply defined, is one good or service traded for another good or service. *See,* Nigel M. Healey, *Why is Corporate Barter?*, 31(2) Business Economics 36, 36 (1996); Don Mardak, *The World of Barter*, 84(1) Strategic Finance 44, 46 (2002); Richard E. Plank *et al.*, *Barter: An Alternative to Traditional Methods of Purchasing*, 30(2) International Journal of Purchasing and Materials Management 52 (1994). Further, bartering is a system of bargaining between two parties to reach an exchange where each can benefit from the value of the traded goods. Caroline Humphrey, *Barter and Economic Disintegration*, 20 (New Series) MAN (now, The Journal of the Royal Anthropological Institute) 48, 49 (1985). Bartering removes the necessity of money in commerce. *Id.* at 51. Money is merely one of the goods being traded.

Adam Smith, the founder of economics, in *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book I, ch.2 (5th ed. 1904), discusses bartering and its influence on the economy. Bartering is used to get those goods and services that an individual needs. Smith also indicated that individuals started specializing in tasks in order to trade any surplus for other necessary goods that another individual specializes in creating. *Id.* Smith said "[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest," which explains how there is an inherent value in the goods the individuals trade instead of giving up something for free. *Id.* Because the goods have a value when trade occurs both parties are getting something of value in return, which is commerce.

Bartering plays a strong role in modern commerce, though the practice is quite old. Major corporations have bartered for decades. In 1935, Monsanto allowed a Chinese company to barter mackerel for saccharin. Tim Phillips, *The New Global Currency*, Guardian Unlimited (Feb. 27, 2003),

http://technology.guardian.co.uk/online/businesssolutions/story/0,12581,903514,00.html. PepsiCo exchanged their products for distribution rights to sell Russian vodka in the 1970s. *Id.* Corporations such as Tesco, BMI, and Coombe International (manufacturer of Odor-Eaters and Just for Men) participate in international bartering. *Id.* In 2004, in North America and Latin America, 2.3 billion dollars were bartered in commercial trades. *2004 Global Reciprocal Trade Statistics*, International Reciprocal Trade Association (2005), http://www.irta.com/Page.asp? Script=56. There are now two national trade associations that assist bartering between corporations: The International Reciprocal Trade Association (IRTA) and National Association of Trade Exchanges (NATE). Bob Meyer, *The Original Meaning of Trade Meets the Future in Barter*, 13(1) World Trade Magazine 46, 48 (2000). Bartering has become global with the help of the Internet, which facilitates bartering between parties of different nations and states, allowing a broader variety of goods and services to be bartered. *Id.* at 48-49.

The reason corporations barter and exchange goods is because of the benefits for the business. It allows the corporation to better shift their inventory during shifts in the supply and demand market. Mardak, 84(1) Strategic Finance at 46-47. Bartering can also create a way for the business to get products or services it could not purchase with cash. Angela Briggins, *When Barter is Better*, 85(2) Management Review 58, 59 (1996). Bartering also allows corporations to reserve cash. Tim Phillips, *The New Global Currency*, Guardian Unlimited (Feb. 27, 2003), http://technology.guardian.co.uk/online/businesssolutions/story/0,12581,903514,00.html. A value is also created through bartering by either bartering products for a higher value than it cost or by fulfilling exchanges for less than in a purchasing situation. Healey, 31(2) Business Economics at 40. The benefits of bartering encourage corporations to participate in the barter system of commerce.

Speech which reflects an economic motivation,

typically in advertisements, is found throughout case law. In *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975), this Court found that an advertisement for abortions in a newspaper was a reflection of "the advertiser's commercial interests." In *Zauderer*, an attorney placed an advertisement in a newspaper to promote his practice and gain new clients. 471 U.S. at 629. In *U.S. Healthcare, Inc.*, Blue Cross/Blue Shield's advertisement for the Personal Choice healthcare plan was motivated by a desire to gain revenue and regain status in "the health insurance market." 898 F.2d at 934.

By advertising that he had good pictures of his daughter Williams was looking for pornographic pictures in return. Like the advertisers in *Bigelow*, *Zauderer*, and *U.S. Healthcare, Inc.*, and like the bartering corporations of PepsiCo, Monsanto, and others, wanting to benefit their businesses, Williams was looking to benefit by accessing more child pornography. His post to the chat room, "Dad of toddler has 'good' pics of her an [sic] me *for swap* of your toddler pics, or live cam," was to initiate a bargain where each party would receive pornographic images of children. *United States v. Williams*, 444 F.3d 1286, 1288 (2006) (emphasis added). Williams was not freely giving his pictures away, but was anticipating a valuable good in return. While it was not an exchange for money, Williams sought to benefit by receiving goods equivalent to or greater than his goods by receiving images of child pornography, which is an economic gain. Williams's anticipation of receiving pornographic images in return for his images is evidence of an economic motivation behind his speech because he is will receive something of value in return for his good.

2. *Williams's Chatroom Postings Indicating Pornographic Pictures for Barter is a Commercial Advertisement Because it is Not a Conveyance of Information or Opinion.*

Williams's online conversations leading to bartering

are commercial advertisements of his products for barter because he is not making a merely an editorial or informative statement about child pornography. In *Bolger v. Youngs Drug Products Corp.*, this Court indicated that advertisements are included in commercial speech characteristics. 463 U.S. at 66-67. In *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942), this Court supported the idea that a commercial advertisement is one in which relates to anything except speech "solely devoted to 'information or a public protest.'" Then in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964), this Court found that speech that does not display *only* information, opinions, or grievances of a matter of public interest is a commercial advertisement.

In *Valentine v. Chrestensen* an advertisement for a United States Navy submarine exhibit was held to be a commercial advertisement. 316 U.S. at 52-53. The advertisement displayed the submarine and indicated an admission fee for the exhibit. *Id.* at 53. This advertisement was a commercial advertisement because the advertisement displayed the price of admission and was not merely information about the submarine nor regarded a matter of public interest. *Id.*

In *New York Times Co. v. Sullivan* the newspaper ran a full page newspaper advertisement discussing non-violent demonstrations by African American students and asked for funds to "support the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr. Martin Luther King, Jr." 376 U.S. at 256-57. The Court found that this was not commercial speech because it was an expression of an opinion and the plea for money was to support "matters of the highest public interest and concern." *Id.* at 266.

Williams posted a public message in the Internet chat room which stated "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." *Williams*, 444 F.3d at 1288. In a private chat with "Lisa_n_Miami" Williams stated "I've got hc [hard core]

pictures of me and dau, and other guys eating her out – do you??" *Id.* He later posted a message on the public chat room stating "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL – SHE CANT." *Id. at* 1288-89.

Williams's first public posting is an advertisement of the goods he is willing to trade with others in the Internet chat room. Like the advertisement in *Valentine*, Williams is advertising a good that he will relinquish for a return exchange of pictures or videos instead of money. Williams is not requesting other pictures or videos in return as a way of supporting a matter of high public interest like that found in the advertisement in *New York Times Co.* Williams's second public chat posting that he had the ability to put up a link to pornographic pictures is an advertisement for the pornographic photographs he claimed to have. This posting was not merely informative or editorial like the advertisement in *New York Times Co.*, but is an advertisement indicating the goods he is willing to commercially barter, or exhibit, like the submarine in *Valentine*, with the others in the chat room. Williams is not merely displaying his opinion or information about the pictures or the link to "hard core" pictures but is advertising a commercial exchange of goods and therefore his advertisements about pictures of his daughter posted for the chat room is a commercial advertisement.

3. *Williams's Chatroom Postings Refer to the Specific Product of Child Pornography Because He Makes Specific Indications That the Images Are Pornographic Images of His Daughter.*

Williams's postings in the public chat room and in the private chat with "Lisa_n_Miami" reference the specific product of pornographic images of a young girl, Williams's daughter, for trade. The characteristics of commercial speech found in *Bolger v. Youngs Drug Products Corp.* state

that the speech should indicate a specific product. 463 U.S. at 66. It can be understood that this indication of a specific product stems from the desire to "disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else." *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

One instance of a specific reference to a product indicating commercial speech is found in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, where advertisements written by pharmacists for prescription drugs were deemed commercial speech. The advertisements specifically referenced particular prescription drugs and price information, thus referencing a specific product. 425 U.S. at 756-57. The advertisements indicated a sale of a prescription drug at a specific price instead of general information. *Id.* at 760-61.

Another example of the reference to a specific product as an indication of commercial speech is found in the advertisements for a healthcare plan produced by Blue Cross/Blue Shield in *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 934 (3d Cir. 1990). The advertisements specifically promoted the Personal Choice plan over other competitors' healthcare plans. *Id.*

Williams posted on the public chat room that he had "'good pics' of her an [sic] me for swap" referring to pictures of him and his toddler-aged daughter. *Williams*, 444 F.3d at 1288. Later, in his private chat with "Lisa_n_Miami" he stated that he had "hc [hard core] pictures of me and dau, and other guys eating her out." *Id.*

Both of Williams's postings are about pictures of his daughter; specifically, pornographic pictures of his daughter. These were not general advertisements about the pictures he had but referenced a specific person indicating her age, gender, and the type of photograph (hard core, young girl, and includes other men). Much like the advertisements in *Virginia State Board of Pharmacy*, which referenced specific prescription drugs instead of general information, these

statements advertise the specific product of pornographic pictures of a young girl instead of general child pornography. Like the advertisements in *U.S. Healthcare, Inc.* which were used to promote customers to prefer one particular kind of healthcare, Williams is also promoting his product of pornographic pictures by clearly indicating that they are specifically of his daughter. By indicating that the pictures he had available to barter with other individuals in the chat room and with "Lisa_n_Miami" were of his own daughter and specifically indicated some of the specifics of the images, Williams was making a reference to a specific, not general, product.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioner's brief, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

This 11th day of June, 2007

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